further argument, both intrinsically and because of their abstractness in the context of the entire proceeding to which the appeal relates.[1]

STATEMENT

This is an appeal from a judgment entered on June 15, 1965, by the United States District Court for the District of Columbia dismissing appellants' complaint that sought to set aside an order of the Interstate Commerce Commission.[2]

The order of the Interstate Commerce Commission under attack was made in an investigation, which the Commission instituted on its own motion, entitled *Prevention of Rail-Highway Grade-Crossing Accidents Involving Railway Trains and Motor Vehicles.* The investigation covered all aspects of the causes of and means of preventing rail-highway grade-crossing accidents. The Commission stated that the purposes of the investigation were to determine "what safety requirements can or should be made, within the authority of this Commission; what additional legislation may be necessary," and to focus "public attention on the gravity of the safety problem occasioned by collisions at railroad crossings." (322 I.C.C. 7).[3]

These appellees, and all other railroads subject to the jurisdiction of the Commission under Part I of

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[1] The names of all railroad appellees are shown in Appendix A to this motion.

[2] The case was heard by a district court of three judges specially constituted pursuant to 28 U.S.C. §§ 2284, 2325.

[3] The Commission's report is reported in 322 I.C.C. at pp. 1-92. It is reproduced as Appendix D to the jurisdictional statement without change in pagination.

the Interstate Commerce Act, and all motor carriers subject to the safety jurisdiction of the Commission under Part II of the Act were made respondents.[4] Evidentiary hearings were held before an Examiner who submitted a recommended decision to the Commission.[5] After the filing of exceptions the Commission, on February 10, 1964, issued a 92-page report in which it made a number of findings and recommendations. (322 I.C.C. 1-92). On September 9, 1964, the Commission entered the order in issue. The order incorporated the Commission's report by reference and discontinued the proceeding. (Jur. St. p. 33).

In its report the Commission found, *inter alia,* that the main cause of crossing accidents is want of care and non-observance of safety laws and regulations on the part of motor vehicle drivers; that federal, state and local enforcement of laws and regulations governing operation of motor vehicles at rail-highway grade crossings is weak; that no additional legislation was required except such as would help in the enforcement of existing safety requirements and in educating the public as to its responsibility in preventing grade-crossing accidents; and that existing safety regulations had not been shown to be deficient and were reasonably adequate to promote safe operations at grade crossings if they were effectively enforced. (322 I.C.C. 86-87).

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[4] On October 5, 1961, the Commission made the proceeding a cooperative one within the terms of an agreement between it and the state regulatory commissions. The National Association of Railroad and Utilities Commissioners designated commissioners from the states of Nevada, Virginia, Massachusetts and Minnesota to sit as a cooperating panel of state commissioners.

[5] There were 20 days of hearings involving 79 witnesses, 179 exhibits and 3,007 pages of transcript.

During the course of the hearings suggestions were advanced by appellants for regulation of railroads in the specific area of grade-crossing matters. The Commission in its report reviewed its statutory authority in this field (322 I.C.C. 45-50) and concluded that the statutes did not "vest in us any jurisdiction over railroads with respect to rail-highway grade-crossing matters" (*id.* at 48). The Commission did not, however, dispose of the suggested regulation of the railroads solely on that ground. It considered the suggestions on their merits and found, as to some, that they would be of no material aid; and, as to others, that there was no need whatever for them or that there were adequate means of solving the problems without federal regulation. (*Id.* at 68-70, 74-84).[6]

The Commission did not recommend that Congress enact legislation authorizing it to regulate the railroads in relation to grade-crossing matters, although it did make some recommendations to Congress, as well as to state and local authorities and to the carriers.[7]

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[6] See pp. 22-25, *infra*. Appellants state that "the Commission found that the present operating conditions need correcting." (Jur. St. p. 20). The Commission made no such finding.

[7] The Commission made only two specific recommendations for federal legislative action. One was that an organization be created either by resolution of Congress or by executive order of the President composed of governmental officials and representatives of industry and labor to formulate uniform standards for grade-crossing protection to be referred to appropriate state officials. The other was that Congress give serious consideration to the enactment of legislation to provide public funds for the installation and maintenance of signals, lights, gates or other protective devices

In addition to its factual findings and its recommendations, the Commission found that certain action on its part was "warranted in the public interest." (322 I.C.C. 90). It stated its intention (1) to intensify, in cooperation with state and local authorities, the enforcement of existing safety laws and regulations; (2) to process to conclusion a rule-making proceeding in which the Commission was considering adoption of a regulation imposing safety requirements on vehicles operated by private carriers transporting explosives or other dangerous commodities in interstate commerce; (3) to revise the Commission's grade-crossing accident reports to make them more detailed and informative, and (4) to institute a rule-making proceeding to consider whether to broaden the category of trucks that must stop at rail crossings.

The complaint filed by appellants in the court below, although in form seeking to set aside the Commission's order as a whole, was in substance directed against a single aspect of the Commission's report, *i.e.*, the Commission's declaration that it lacked statutory authority to regulate railroads in specific respect to grade-crossing safety matters. In that court, as here, appellants argued that this authority was conferred upon the

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intended to prevent accidents at grade crossings. The latter recommendation was based on the Commission's findings that the major cost of grade separation and protection at rail-highway grade crossings should be borne by the public since the public is the principal recipient of the benefits derived from grade-crossing protection, and that it would be unfair to expect the railroads to assume the heavy financial burden involved in these improvements. (322 I.C.C. 81-83).

Commission by Sections 1(21) and 25 of the Interstate Commerce Act, 49 U.S.C. §§ 1(21), 26.

Appellants did not attack the findings of fact made by the Commission with respect to the causes and possible methods of prevention of grade-crossing accidents. Specifically they did not attack the Commission's findings that certain suggestions for regulation of railroads were not justified by the evidence. Nor did appellants contend that the action of the Commission in announcing that it intended to proceed with two rule-making proceedings involving the possible regulation of motor carriers was in excess of the Commission's statutory authority or otherwise unlawful.

The court below held unanimously that the Commission had correctly interpreted the relevant statutes and that under those statutes it was not authorized to regulate the railroads with specific respect to grade-crossing safety matters. On that basis it dismissed the complaint. (Jur. St. pp. 25-32). The court below also took note of the contention advanced by these appellees and by the other defendants below that the appellants had no standing to attack the Commission's declaration concerning its authority over railroads. The court stated that it believed that "the plaintiffs lack status to maintain this action, and if the Court were required to pass upon this question, it would so hold." (Jur. St. p. 30).[8]

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[8] The railroad appellees argued below that the Commission's declaration concerning its lack of statutory authority was not a reviewable order. The court did not find it necessary to pass upon this contention or "to enlarge upon the question of plaintiffs' status to sue." (Jur. St. p. 30).

ARGUMENT

Although appellants' statement of the questions presented is set forth in three paragraphs, the statement in fact raises only a single question for review. That is whether the provisions of the Interstate Commerce Act authorize the Interstate Commerce Commission to regulate railroads with respect to rail-highway grade-crossing matters. (Jur. St. p. 3).

Appellants do not seek review of the Commission's findings of fact concerning the causes of grade-crossing accidents or its findings of fact that the proposals for regulation of railroad operations were not appropriate or necessary and would not materially assist in the prevention of grade-crossing accidents. For the purpose of this appeal, therefore, those findings must be regarded as valid. Nor do appellants seek review of the Commission's announced intention to proceed with the two rule-making proceedings referred to in its report. It follows that questions as to the legality of those proceedings or their possible impact upon appellants are not open on this appeal.

We submit that in these circumstances the statement of the Commission as to its own authority to regulate railroads in specific relation to grade-crossing matters raises no question that deserves plenary consideration by this Court for the following reasons:

1. Appellants have no standing to challenge the declaration of the Commission, which is abstract in character and does not invade or affect any interest of appellants so as to entitle them to seek judicial review.

2. The Commission's interpretation of its own statutory authority is so clearly correct as to justify sum-

mary affirmance of the decision below. That interpretation is supported by the words of the statutory provisions involved and by their legislative history and is sanctioned by 45 years of statutory interpretation and application.

3. Even if the question of statutory construction were closer, it would not warrant this Court's plenary consideration. It is a dry question without practical significance in view of appellants' failure to challenge the findings that independently sustain the Commission's decision not to promulgate the rules governing railroads proposed by appellants.

I. Appellants Have No Standing To Challenge the Commission's Declaration

The order of the Commission incorporating by reference its declaration concerning the extent of its regulatory authority over railroads has no impact on appellants or on the motor carriers that they purport to represent.[9] The declaration does not command the appellants or motor carriers to do or to refrain from doing anything; it does not grant or withhold from them any authority, privilege or license; it does not extend or abridge any of their powers or facilities; it does not subject them to any liability, civil or criminal, and it does not change their existing or future regulatory status or condition. In every significant respect the declaration therefore resembles administrative action which this Court has held results in no conse-

[9] The members (or stockholders) of the appellant American Trucking Associations, Inc., are not motor carriers but associations of motor carriers, including the appellant National Tank Truck Carriers, Inc., which does have motor carriers as its members (or stockholders).

quence to a litigant that entitles him to judicial review. See *United States* v. *Los Angeles & Salt Lake R.R.*, 273 U.S. 299, 309-10. The Commission's declaration does not even determine the regulatory status of appellants or motor carriers in any preliminary or terminatory way that portends the application of regulatory authority to them or the imposition upon them of civil or criminal liability, or that establishes a basis upon which they must order and arrange their own activities. The standing of appellants, therefore, cannot be justified by reliance upon *Frozen Food Express* v. *United States*, 351 U.S. 40, and similar cases.

Even though the District Court stated its belief that the appellants "lack status to maintain this action" and did not translate its belief into a holding only because the statutory issue posed by appellants was readily disposed of, appellants do not present or discuss in this Court the question of their standing. They do state that as a result of its decision the Commission will impose no safety regulations upon the railroads while "regulated interstate motor carriers will be plagued with attempts to hobble them with more encompassing and stricter regulations." (Jur. St. pp. 20-21). This suggests a theory of standing based on the fact that railroads and motor carriers are competitors. In substance it is an argument that, since the Interstate Commerce Commission admittedly has authority under Section 204 of the Interstate Commerce Act to regulate the operations of motor carriers in the interests of safety, it follows that those motor carriers have standing to seek judicial review if the Commission erroneously decides that it lacks comparable authority over the activities of their competitors, the railroads.

We submit that this alleged competitive interest, attenuated as it is, does not entitle appellants to seek judicial review of what the Commission said in its report about the scope of its regulatory authority over rail carriers in relation to grade-crossing problems. It is well settled that a person does not establish his standing to question the legality of governmental action merely by asserting that the action will expose him to enhanced or intensified competition. *Tennessee Elec. Power Co.* v. *TVA,* 306 U.S. 118; *Alabama Power Co.* v. *Ickes,* 302 U.S. 464; *Alexander Sprunt & Sons, Inc.* v. *United States,* 281 U.S. 249, 255; *Edward Hines Yellow Pine Trustees* v. *United States,* 263 U.S. 143, 148. This general principle applies unless the statute involved confers standing upon one who alleges that unlawful action has injured his competitive status. The most familiar illustration of the exception is provided by cases arising under regulatory statutes that contain licensing provisions that are designed to restrict competition and that therefore permit existing competitors, upon whom the impact of the grant of a license falls, to question the legality of the grant.[10] This exception affords no comfort to appellants. The provisions of the Interstate Commerce Act upon which appellants rely, even if interpreted in accordance with appellants' contentions, have no such purpose. They are neutral as to competition. They are, therefore, in no way comparable to statutory provisions that have been held to create a legal interest that entitles one to seek judicial review on the ground

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[10] See, *e.g.*, American Trucking Ass'ns, Inc. v. United States, 364 U.S. 1; FCC v. Sanders Bros. Radio Station, 309 U.S. 470; *cf.* The Chicago Junction Case, 264 U.S. 258.

that administrative action has adversely affected his competitive status.

The infirmities in appellants' assertion of standing are demonstrated by the nature of the arguments that they have made both in the court below and here. In the court below the appellants argued that they had standing to attack the Commission's declaration that it has no statutory authority to regulate the railroads in specific relation to grade-crossing matters because as a result of that declaration the Commission had instituted a rule-making proceeding looking toward a revision of safety regulations governing regulated motor carriers that would impose additional burdens on those carriers. (Appellants' Reply Brief in the District Court, pp. 7-9). In their jurisdictional statement appellants suggest the same line of argument in more general terms. (Jur. St. pp. 20-21).[11]

The appellants obviously have no standing on this appeal to attack the action of the Commission in conducting rule-making proceedings relating to motor carriers. For one thing, appellants have not asked this Court to review the legality of any exercise by the Commission of its rule-making power to govern their conduct. For another, any attempt to review the Commission's action in a rule-making proceeding on this appeal would be premature; that review must wait until the Commission adopts a rule that impinges upon a legal interest of the motor carriers. But over and

[11] Appellants now concede that in the rule-making proceeding the Commission decided not to adopt the "more burdensome amendments" of its regulations which appellants professed to fear. They assert however that "the proceeding is an indication of what the motor carriers can expect as a result of the findings here of lack of jurisdiction over railroads." (Jur. St. p. 21 n. 8).

above these points, the decisive fact is that the Commission itself in the rule-making proceeding rejected categorically appellants' suggestion that there was any relationship between its lack of authority to regulate railroads and the exercise of its rule-making authority over motor carriers. See *Qualifications of Employees and Safety of Operation,* 98 M.C.C. 741, 746. In that proceeding appellants urged that the revisions of the motor carrier safety regulations should await the outcome of this case apparently in the belief that the Commission might prescribe less burdensome regulations for motor carriers if it were ultimately held that it had comparable authority to regulate the railroads. The Commission made clear that it prescribes motor carrier safety regulations as the public interest demands, not as a matter of doing the expedient, next-best thing that the statute happens to permit.

> "[W]e do not believe that the imposition by us of safety regulations is dependent only upon considerations as to who will pay the cost or by pleas that other segments of the transportation industry also should be additionally regulated. Thus, even if it were found that the Commission has jurisdiction to require the railroads to take steps which would reduce grade crossing accidents, imposition of the regulations proposed here are warranted if they are in the public interest and promote safety. No useful purpose would be served, therefore, by delaying our consideration of the issues involved." 98 M.C.C. at 746.

The appellants thus have suffered no legal wrong by reason of the declaration of the Commission of which they complain. Their lack of standing makes it unnecessary even to reach the single question they present, which as we shall next show is unsubstantial in any event.

II. The Decisions of the Interstate Commerce Commission and of the Court Below on the Scope of the Commission's Authority Were Clearly Correct and Should Be Affirmed by This Court

The Interstate Commerce Commission, after a careful review of the relevant provisions of the Interstate Commerce Act, concluded that the statute does not authorize it to regulate the operation or practices of railroads in specific relation to matters affecting the safety of grade crossings. (322 I.C.C. 45-50). The Commission's conclusion, which is sanctioned by 45 years of consistent statutory interpretation and application, was affirmed by the court below. That decision is plainly correct and raises no question that deserves plenary consideration by this Court.

Appellants' attack on the decision of the Commission rests on the assertion that Sections 1(21) and 25 of the Interstate Commerce Act confer upon the Commission authority to regulate the operations and practices of railroads for the express purpose of promoting safety at grade crossings. There is no substance in this contention. Both the words of these statutory provisions and their legislative history require its rejection. It is significant that neither in the court below nor here have appellants cited a single decision by the Commission or by a court interpreting and applying these statutory provisions in a manner that provides support for their argument.[12]

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[12] In their jurisdictional statement appellants cite decisions that they assert support a number of abstract propositions as, for example, that the Interstate Commerce Act "is remedial in nature and must be liberally construed in order to effect its evident purpose;" that the Act is framed in "general terms" because "Congress did not spell out the details for dealing with 'every evil sought to be corrected' "; and that "one of the purposes for creating regu-

Appellants rely upon *Fairport, P. & E.R.R.* v. *Meredith,* 292 U.S. 589. That decision is not apposite. The issue there was a pure issue of tort law, whether a railroad could be held liable to a highway traveler injured in a grade-crossing accident by reason of a violation of the provisions of the Safety Appliance Act that require railroads to equip their trains with power brakes and to maintain them in operating condition. The Court did not decide or even discuss any question relating to the scope of the Commission's authority under Section 1(21) and Section 25 of the Interstate Commerce Act. The opinion in that case is in no sense inconsistent with the report of the Commission in the instant proceeding.[18]

Section 1(21) empowers the Commission, after hearing, to order a railroad "to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this chapter . . .." Section 1(10) defines "car service"

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latory agencies was to relieve Congress of the need for framing exhaustively detailed legislation." (Jur. St. pp. 17 n.4, 18 nn.5&6). The general propositions asserted are at best of only remote relevance, and the decisions cited did not deal with issues of statutory interpretation that resemble in any degree those involved here.

[18] The Commission in this case recognized that the Safety Appliance Act requires railroads to install and maintain power brakes (322 I.C.C. 45) and that under the provisions of the Power Brake Law of 1958 it has the authority to prescribe rules and standards for the installation and maintenance of power or train brakes (*id.* at 78). The Commission rejected suggestions that it exercise its authority over train brake performance to establish stopping distances for all trains on the ground that there was no evidence that defective railroad equipment caused or contributed to grade-crossing accidents and that there was no reason to believe that additional power brake regulations were needed, not on the ground that it lacked statutory authority to take the suggested action. See p. 24, *infra*.

to include "the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property . . . ." The appellants' argument so far as Section 1(21) is concerned is based entirely upon the view that the inclusion of the one word "safe" in the provision vests the Commission with unlimited authority over all railroad operations so long as it is exercised in the interest of safety.

Section 1(21) was enacted more than 45 years ago. As the words of the section show, it was designed solely to give the Commission authority to regulate freight car supply and freight car distribution and to prevent freight car shortages. See ICC Ann. Rep., 1916, pp. 67-74, 91-92. The operation of the section is expressly limited to cars and other vehicles "used in the transportation of property." This limitation in itself shows that the section was not designed to confer upon the Commission any authority whatsoever to regulate overall—both as to passengers and freight service—the operations and practices of railroads. Certainly if Congress in enacting the section had been concerned with the problem of safety at grade crossings it would hardly have excluded from the scope of the statute the operations of passenger trains.

During its 45-year history, Section 1(21) has never been considered by the regulatory body charged with its administration, by the railroads subject to its provisions or by any court to have the meaning for which appellants now contend. The courts have consistently ruled that "car service" is a term of limited rather than broad scope. *ICC* v. *Oregon-Washington R.R. & Navigation Co.*, 288 U.S. 14, 34-35; *ICC* v. *Los Angeles*, 280 U.S. 52; *Peoria & Pekin Union Ry.* v. *United*

States, 263 U.S. 528. In *Train Service on the Northern Pacific*, 112 I.C.C. 191, 195, the Commission reiterated its view that Section 1(10) gave it no jurisdiction over the operation of passenger trains[14] while holding that Section 1(10) gave it jurisdiction to regulate "the supply"—not operation—of trains for the transportation of property.

The conclusion required by the language of Section 1(21) is confirmed by its legislative history. That history is barren of any suggestion that Congress regarded the section as designed to deal with the problem of safety at grade crossings. The fact is that safety problems were not mentioned in the debates or in the committee reports that preceded the enactment of the Esch Car Service Act of 1917 or its amendment by the Transportation Act of 1920.[15]

Section 25 of the Interstate Commerce Act, appellants' second reliance, is also a provision of specific and limited scope. Known as the Signal Inspection

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[14] It is clear on the face of the §§ 1(10), (21) that, whatever else it may mean, car service has to do only with the carriage of property. Thus, one bizarre result of appellants' reading of § 1(21) would be that the Commission could prescribe rules, such as maximum speeds, for freight trains but not for faster-moving passenger trains.

[15] It is significant that the House committee report on the bill that became the Transportation Act of 1920 stated that the purpose of the bill as introduced was to amend the Act of May 29, 1917, so as to include in the definition of "car service" in § 1(10) the use, control, supply, movement and distribution of cars, locomotives and other vehicles and "the supply, *movement and operation* of trains." H.R. Rep. No. 456, 66th Cong., 1st Sess. 17 (1919). (Emphasis supplied.) However, in the conference committee report the last phrase was narrowed so as to embrace only the "supply of trains"; the "movement and operation" of trains was eliminated. H.R. Rep. No. 650, 66th Cong., 2d Sess. 24 (1920).

Act, it empowers the Commission, after investigation, to order any carrier "to install the block-signal system, interlocking, automatic train stop, train control, and/or cab-signal devices, and/or other similar appliances, methods, and systems intended to promote the safety of railroad operation . . . ." This provision, the Commission correctly held, applies only to the specific systems, devices and signals named in the section and to other "similar" appliances, methods and systems used for control of the movement of trains. (322 I.C.C. 46). The words of the section cannot reasonably be read as covering "highway grade-crossing protective devices" or as giving the Commission general authority to issue regulations designed to guard against grade-crossing accidents.

The Commission's reading of the section is plainly correct on the face of the statutory language, and the legislative history cited in the District Court's opinion puts the matter beyond question. In the consideration of the bills whose enactment in 1937 gave Section 25 its present content, it was proposed to include "highway grade-crossing protective devices" in the list of devices that the Commission might order installed. The reference was stricken on the recommendation of the Commission's spokesman.[16] (Jur. St. p. 29; see

[16] Appellants complain of the District Court's consideration of the legislative history of § 25. They do not suggest that the legislative history relied upon by the court and by railroad appellees is incorrect or that there is any other inconsistent legislative history. Instead appellants assert that the language of §§ 1(21) and 25 is so plain and unambiguous that resort to extrinsic aids to determine its meaning is impermissible. (Jur. St. p. 14). This assertion is difficult to reconcile with appellants' implicit concession that the authority they contend the Commission possesses is not specifically granted but should be inferred from broad considerations of "purpose and policy." (See *id.* at 17-19).

S. 29 and H.R. 185, 75th Cong., 1st Sess. (1937); *Hearings on H.R. 185 Before the House Committee on Interstate and Foreign Commerce,* 75th Cong., 1st Sess. 5-6 (1937). The Signal Inspection Act thus is in the pattern of Congressional action in respect of the safety of railroad operations, which has been to confer on the Commission only limited jurisdiction in specific areas.[17]

Sections 1(21) and 25 of the statute considered either singly or together cannot be read as conferring upon the Commission the authority that appellants now assert it possesses. Appellants, both before the Commission and in the court below, painted with a broad brush in their statutory argument, and they continue to do so here. They do not ever articulate how even their strained reading of the two statutory provisions on which they rely authorizes the particular regulations that they asked the Commission to prescribe. Section 1(21) of the statute, on any view of its terms, cannot extend to passenger trains. And Section 25 by its terms, on any reading, covers only certain physical devices. It follows that these provisions, even if given the construction most favorable to appellants that their specific terms permit, cannot justify the generally applicable speed limits, warning time, braking time and right-of-way maintenance requirements that they now assert the Commission is authorized to impose.

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[17] See Locomotive Inspection Act, 45 U.S.C. §§ 27-34; Safety Appliance Act, 45 U.S.C. §§ 1-15; Hours of Service Act, 45 U.S.C. §§ 61-64; Power Brake Act of 1958, 45 U.S.C. § 9; Transportation of Explosives Act, 18 U.S.C. §§ 831-35.

Appellants attempt to bolster their strained construction of Sections 1(21) and 25 of the Interstate Commerce Act, by invoking the National Transportation Policy. Their second question presented indicates that they intend to argue that the Commission's holding "that it has no safety jurisdiction over the railroads with respect to rail-highway grade-crossing matters but does have authority to prescribe regulations for the safe operation of motor vehicles under its jurisdiction is in contravention of the National Transportation Policy." The jurisdictional statement gives no content to or explanation of this argument. It is plainly without substance.

The National Transportation Policy is a declaration by Congress of broad standards that are designed to guide the Commission in the exercise of the regulatory powers that are delegated to it by other provisions of the Interstate Commerce Act. The declaration does not confer any authority on the Commission not specifically conferred by the substantive provisions of the Act or extend or otherwise change any of those provisions.

Section 204 of the Interstate Commerce Act expressly grants to the Commission broad authority over "the safety of operation and equipment" of interstate motor carriers. The plain and explicit terms of Section 204 are in sharp contrast to the sections in Part I of the Act which appellants attempt to construe as giving the Commission jurisdiction over the operations and practices of railroads in specific relation to grade crossings. The contrast between these different substantive provisions of the statute was deliberately made by Congress and cannot be obscured or erased

by reference to the National Transportation Policy. That policy does not repeal clear differences in the substantive provisions of the various parts of the Interstate Commerce Act.

There are many examples of differences in the scope of the Commission's economic regulatory authority over railroads under Part I, over motor carriers under Part II, and over water carriers under Part III of the Act. The "fair and impartial regulation of all modes of transportation" directed by the National Transportation Policy does not mean that distinctions drawn by Congress in the Commission's regulatory authority over various classes of carriers are to be ignored.

The appellants attack the opinion of the District Court by asserting that "the cornerstone of the District Court's reasoning is that federal jurisdiction and state jurisdiction over grade crossing safety are mutually exclusive," and they devote a part of their jurisdictional statement to an argument that federal and state powers in the field of regulation of grade crossing safety are not "mutually exclusive" but may be exercised concurrently. (Jur. St. pp. 8-12). This argument misreads the opinion of the court below and is directed to a false issue of constitutional law.

The District Court viewed the question before it as essentially one of statutory construction. It stated that the basic issue was "whether Congress has invested the Interstate Commerce Commission with jurisdiction over railroads with respect to rail-highway grade-crossing matters." (Jur. St. p. 26). The ultimate holding of the court was "that neither Section 1(21) of the Interstate Commerce Act, nor Section 25(b) of

the Interstate Commerce Act, vests the Commission with any safety jurisdiction over railroads with respect to rail-highway grade-crossings." (*Id.* at 30). This determination that Congress had not authorized the Commission to regulate the railroads in specific relation to grade-crossing safety logically led to the further conclusion that Congress had left that area of regulation in the hands of the states. The District Court's statement "that jurisdiction to establish safety regulations with respect to rail-highway grade-crossing matters resides exclusively in the states" (*ibid.*), read in context, merely states this logical conclusion. It was not a holding on any question of constitutional law.

The appellants' argument attaches excessive importance to the fact that in an earlier passage in its opinion the District Court accurately observed that historically public safety regulation of rail-highway grade-crossings was a matter peculiarly within the police power of the states. This consideration was relevant in considering the question of statutory interpretation raised by appellants' contentions. But the District Court did not regard this consideration as controlling or rest its decision on that ground. Certainly the court below did not hold that the states possess exclusive power in this field as a matter of constitutional law or that concurrent regulation by state and federal agencies is impossible either in constitutional or practical terms.

III. Because They Do Not Challenge the Findings of the Commission Concerning the Causes of Grade-Crossing Accidents and What Should and Should Not Be Done About Them, Appellants Present a Sterile Question Without Practical Significance

Appellants contend that the question they present is substantial because the Commission's declaration concerning its authority "will prevent any effective action to reduce grade-crossing accidents by the one agency in a position to act." (Jur. St. p. 5). This assertion ignores the Commission's finding that despite the increased exposure to accidents resulting from the "phenomenal increase" in the number and use of motor vehicles, "remarkable success has been achieved in highway and grade-crossing safety" (322 I.C.C. 21), without any regulation by the Commission of railroads in respect of grade-crossing matters. Appellants' assertion is misleading in its implications that railroads are in a major way to blame for the grade-crossing accident problem, that federal regulation of railroads in the interest of safety at grade crossings therefore is necessary and that the Commission would have prescribed such regulation had it thought it had the power to do so. The Commission's findings are to the contrary on each point.

The fact is that the findings the Commission made as a result of its investigation strongly indicate, if they do not demonstrate, that the Commission in the exercise of its permissible administrative judgment would not have prescribed grade-crossing safety regulations governing railroads even if it had been given the power to do so. Appellants did not challenge these findings below, and they do not challenge them here.

In the aggregate the Commission's findings as to the causes of grade-crossing accidents and as to what should be done to remedy them establish that it did not

believe that the evidence before it demonstrated any need for federal regulation of railroads of the kind suggested by appellants. It found that the principal cause of grade-crossing accidents was lack of care and inattention to laws and regulations on the part of drivers of automobiles, trucks and buses. It found that existing safety regulations were reasonably adequate to promote safe operations at grade crossings if they were enforced; it recommended more rigorous enforcement of the regulations of all agencies, federal, state and local. And, despite its conclusion that it had no jurisdiction to promulgate regulations governing railroads in the specific interest of promoting safety at grade crossings, it did not find that there was any need for legislation to confer this jurisdiction upon it. See p. 4, *supra*.

In their jurisdictional statement appellants cite and complain of three kinds of regulation of railroads that the Commission did not prescribe. (Jur. St. p. 20). These relate to the timing of the warning that is given to motorists of the approach of trains to grade crossings; improvements of maintenance of railroad rights-of-way at grade crossings and uniform stopping distances for trains.

The Commission did state its belief that, if at least 20 seconds warning of the approach of all trains were given, it would "aid materially in preventing many grade-crossing accidents." (322 I.C.C. 79). The Commission concluded that it had no jurisdiction over the matter, but it found that "local authorities and the railroads" were in a position to take appropriate action to the desired end. (*Ibid.*) The Commission did not regard the matter as of sufficient importance to justify a recommendation to Congress that it be given statutory authority to deal with it.

Similarly, the Commission urged railroads to improve the maintenance of their rights-of-way at grade crossings to improve visibility. (322 I.C.C. 89). This is a bare recommendation by the Commission. The matter is not treated in the body of its report. There is no finding that present grade-crossing maintenance practices have contributed in the slightest to accidents. Again, the Commission did not ask for statutory authority in the premises. In short, there is nothing to suggest that the Commission would have adopted regulations on this subject had it thought itself empowered to do so.

With respect to uniform stopping distances and the related matter of train brake performance the Commission noted that it had prescribed regulations governing power brakes and that, in view of them, it was not convinced that additional regulations were needed.[18] It went on to say that it was doubtful whether the prescription of stopping distances for trains "would materially aid in preventing accidents at grade crossings, because of the impracticability of compliance with any prescribed stopping distances." (322 I.C.C. 78).

The Commission took the same view of other suggestions that appellants made for regulation of the railroads. In every case appellants' proposals for regulating the railroads were considered and disposed of on alternative grounds other than the Commission's lack of power. Had that not been so and had the Commission been convinced of the need for it to prescribe the regulations that the truckers proposed, there

[18] The Commission found the record "devoid of any evidence to the effect that defective railroad equipment caused or contributed to the cause of any grade-crossing accident" (322 I.C.C. 77).

is no reason that it would not have asked for legislation to remedy its want of power; it did not do so.

The Commission, for example, discussed at length a proposal that reflectors or reflectorized markings be required on the sides of railroad cars. It found it doubtful that "the placing of reflectorized material on the sides of cars would serve any useful purpose or justify the expense of installing such material." "Therefore," the Commission went on, "we are disinclined to recommend its installation." (322 I.C.C. 70). It was urged that maximum train speeds be established. The Commission first noted that "the speeds of both trains and motor vehicles were not significant in [grade-crossing] accidents." (*Id.* at 18). It pointed out further that in an indirect way it already regulated train speeds, *i.e.*, by requiring certain safety equipment where trains are operated at particular speeds, thereby giving the railroads the option of installing the equipment or reducing speeds. The Commission then declared that it was not convinced on the record "that the prescription of maximum speeds for trains or the imposition of any restrictions in train speeds would materially aid in reducing the number of rail-highway grade-crossing accidents." (*Id.* at 75-76). Finally, there was a recommendation that the Commission prescribe rules governing the qualifications of railroad employees such as it has prescribed for motor carriers' employees. The Commission said that, "based on this record, we are not impressed with the effectiveness of such recommendation for the prevention of grade-crossing accidents." [19] (*Id.* at 79).

[19] The Commission also stated that "the comprehensive record made here gives no evidence indicating that the physical or mental qualifications of railroad employees contributed in any way to rail-highway grade-crossing accidents." (322 I.C.C. 80)

The conclusion is inescapable that the Commission did not turn down appellants' proposals solely because of its view of the limits of its jurisdiction but alternatively and independently because the appellants did not make a case on the facts that persuaded the Commission that what they proposed was needed or would serve the public interest. The appellants do not assert that the Commission's factual findings as to the merits of their proposals are unsupported by the evidence. We have shown that the findings would stand even if the Commission took a different view of its statutory power. In those circumstances the question of statutory construction that appellants present is a dry one without practical significance, and this Court should not consider it.

CONCLUSION

The judgment of the United States District Court for the District of Columbia should be affirmed.

Respectfully submitted,

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APPENDIX A

The Atchison, Topeka and Santa Fe Railway Company
The Ahnapee and Western Railway Company
Alton and Southern Railroad
Atlanta & Saint Andrews Bay Railway Company
Atlantic Coast Line Railroad Company
Baltimore & Ohio Railroad Company
Bonhomie and Hattiesburg Southern Railroad Company
Central Railroad Company of New Jersey
The Chesapeake & Ohio Railway Co.
Chicago, Burlington & Quincy Railroad Co.
Chicago & Eastern Illinois Railroad
Chicago Great Western Railway
Chicago, Milwaukee, St. Paul and Pacific Railroad
Chicago and North Western Railway Company
Chicago, Rock Island and Pacific Railroad Company
Chicago South Shore and South Bend Railroad
Claremont and Concord Railway Company, Inc.
Delaware and Hudson Railroad Corp.
The Denver and Rio Grande Western Railroad Company
Erie Lackawanna Railroad Company
Great Northern Railway
Green Bay and Western Railroad Company
Gulf, Mobile and Ohio Railroad Company
Illinois Central Railroad
Kansas City Southern Railway Co.
Lehigh Valley Railroad Company
Louisville & Nashville Railroad Company
Missouri-Kansas-Texas Railroad Co.
Missouri Pacific Railroad Company
New York Central Railroad Company
New York, New Haven & Hartford Railroad Co.
Nickel Plate Road
Norfolk & Western Railway
Northern Pacific Railway
The Pennsylvania Railroad Company
Pittsburgh & Lake Erie Railroad Co.

Reading Company
Roscoe, Snyder and Pacific Railway Company
St. Johnsbury & Lamoille County Railroad
St. Louis-San Francisco Railway Co.
The San Luis Central Railroad Company
Santa Maria Valley Railroad Company
Seaboard Air Line Railroad Company
Soo Line Railroad Company
Southern Pacific Company
Union Pacific Railroad
Wabash Railroad System
Western Maryland Railway Company
The Western Pacific Railroad Company
Alabama Great Southern Railroad Company, The
Atlantic and East Carolina Railway Company
Carolina and Northwestern Railway Company
Central of Georgia Railway Company
Chattanooga Station Company
Chattanooga Traction Company
Cincinnati, New Orleans and Texas Pacific Railway Company
The Georgia & Florida Railway Company
Georgia Southern and Florida Railway Company
Harriman and Northeastern Railroad Company
Interstate Railroad Company
Live Oak, Perry & Gulf Railroad Company
Louisiana Southern Railway Company
New Orleans and Northeastern Railroad Company
New Orleans Terminal Company
St. Johns River Terminal Company
South Georgia Railway Company, The
Southern Railway Company
State University Railroad Company